IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1849

MULTI-MEDICAL CONVALESCENT AND NURSING CENTER OF TOWSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDICES THERETO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Multi-Medical Convalescent and Nursing Center of Towson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 24, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported appears in the Appendix hereto. Also included in the Appendix hereto is the opinion of the National Labor Relations Board of June 30, 1976 from which Petitioner appealed to the Court of Appeals, and the Decision of the Administrative Law Judge issued on March 24, 1976.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 24, 1977. A timely petition for rehearing en banc was denied on March 28, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Union authorization cards are valid when employees are told by the Union that the cards are for the *purpose* of getting an election although the expression "only" or "sole" purpose is not used.

2. Whether turnover in the bargaining unit is a factor which should be considered by the NLRB in determining the appropriateness of a bargaining order as a remedy for unfair labor practices.

3. Whether the Administrative Law Judge denied to Employer its due process right to impeach testimony of NLRB witnesses and to make offers of proof to preserve the record.

STATEMENT OF THE CASE

Petitioner Multi-Medical Convalescent and Nursing Center of Towson (hereinafter called "Employer") is a Maryland limited partnership engaged in the operation of a nursing home in Towson, Maryland. Pursuant to Section 10(f) of the Labor-Management Relations Act of 1947, 29 U.S.C. §160, Petitioner filed with the United States Court of Appeals on July 8, 1976 a petition for review of a decision and order issued by the National Labor Relations Board on June 30, 1976, affirming the rulings, findings and conclusions of Administrative Law Judge Benjamin Lipton that Petitioner violated Section 102 of the LMRA of 1947, 29 U.S.C. §158.

On April 7, 1975 District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO (hereinafter called the "Union") filed a Petition with the National Labor Relations Board in which the Union sought to be certified as the bargaining representative of the Employer's "regular full-time and regular part-time service and maintenance employees employed by the Employer at its Towson, Maryland location". On May 14, 1975 a representation election was held; the Union failed to obtain a majority of the ballots cast.

As a result of unfair labor practice charges and objections to the election filed by the Union with the National Labor Relations Board, the Regional Director from the Fifth Region issued a Complaint and Notice of Hearing against the Employer — Case Nos.: 5-CA-7287 and 5-RC-9304. Said Complaint alleged that the Employer violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* The relief requested was the issuance of a bargaining order against the Employer requiring it to bargain with the Union. A subsequent Complaint issued by the Board alleging violation of Section 8(a)(3) against the Employer was consolidated with the above-mentioned Complaint.

Hearings were held on September 16, 24, 25 and October 21, 1975 and January 14, 1976. The hearings were held before Administrative Law Judge Benjamin Lipton to determine whether the Employer had violated Section 8(a)(1) and 8(a)(3) of the Act.

Judge Lipton issued his decision on March 24, 1976. He decided, *inter alia,* that the Employer violated Section 8(a)(3) of the National Labor Relations Act by discharging employees for union activities; that Employer violated Section 8(a)(1) by improperly threatening employees with layoff in a speech; and that a

bargaining order should be issued against Employer because of these violations.

Employer filed Exceptions with the NLRB to Judge Lipton's decision on April 14, 1976. The National Labor Relations Board issued its Decision and Order on June 30, 1976, adopting all rulings and findings of Judge Lipton and, additionally, finding Employer to have violated Section 8(a)(5) of the Labor-Management Relations Act. Employer filed a Petition for Review with the Court of Appeals for the Fourth Circuit on July 8, 1976. On February 24, 1977, the Court issued its opinion affirming the decision of the NLRB.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS OF THE FOURTH CIRCUIT AS WELL AS DECISIONS OF OTHER COURTS OF APPEALS AS TO WHAT CONSTITUTES MISREPRESENTATION IN THE SOLICITATION OF UNION AUTHORIZATION CARDS.

Employer presented undisputed testimony before the Administrative Law Judge that the authorization cards of two employees were obtained by misrepresentation — that the cards were for the purpose of getting an election and not for the purpose of designating the Union as their representative. One of the employees stated that she was told that the card "was to try to get an election for the Union to come into the building". The other employee testified that she was told that signing the card would help the Union get an election. Without these two authorization cards, the Union did not have valid cards from a majority of the employees.

The Administrative Law Judge credited the testimony of the two employees but took the position that the cards were valid because the employees had not been told the "sole" or "only" purpose of the card was to get an election; the Board adopted the Administrative Law Judge's finding. The Fourth Circuit Court of

Appeals ruled that the Administrative Law Judge's finding was correct — the cards were not obtained by misrepresentation because the employees were not told that the "sole" or "only" purpose of the cards was to get an election (2a and 3a).

The Court's ruling that the authorization cards of the two employees were not obtained by misrepresentation is in conflict with the rule of law established by the Supreme Court and applied by every Circuit — including the Fourth Circuit.

The Fourth Circuit, in making its finding, relied on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) where the Supreme Court adopted the NLRB's *Cumberland Shoe* rule stating that employees will be bound by the clear language of the card they sign unless the language is cancelled by deliberate statements of a union adherent. The Fourth Circuit, however, overlooked the fact that the Supreme Court in *Gissel* also expressly noted the Board's language in *Levi Strauss* where it was stated that the *Cumberland Shoe* rule should not be applied mechanically — the words "sole" or "only" need not be used in order for there to be a misrepresentation.

> ". . . [E]mployees should be bound by the clear language of what they sign *unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. . . .*" (Emphasis added) 395 U.S. 606.

The Circuit Courts — including the Fourth Circuit — have heretofore heeded the admonition of the Supreme Court in *Gissel* in determining whether statements by a union solicitor constitute a misrepresentation.

In *Louisburg Sportswear Co. v. NLRB,* 462 F.2d 380, 387 (4th Cir. 1972), the Court reversed the Board's holding that certain cards were valid saying:

> "The language of the card was an unequivocal designation of the union as a bargaining representative of the signers. There was testimony, however, that many of them, obtained by Amalgamated's organizer, Barnes, and William Foster, were obtained with representations that the cards were sought for the purpose of obtaining an election, and that the cards would be effective and binding only if an election were held and the union won. This testimony was credited by the Board, but was disregarded on the ground that the card signers could not have failed to understand the clear meaning of the printed words.
>
> This resolution of the matter misses the point for the card is invalid for the purpose of a card check if its language is clearly contradicted by contrary representations."

In *NLRB v. South Bay Daily Breeze,* 415 F.2d 360 (9th Cir. 1969) — decided shortly after the Supreme Court's *Gissel* decision — the Court held invalid a card where the union organizer told the employee that "the cards would bring about an election".

The Eighth Circuit in *Fort Smith Outerwear, Inc. v. NLRB,* 499 F.2d 223 (8th Cir. 1974) considered invalid the authorization cards of employees who had signed after being told by the union solicitor that the card was to petition for an election and that if enough people signed there would be an election.

Thus, the Fourth Circuit's ruling in the instant case is in direct conflict with the Supreme Court's decision in *Gissel* and the decisions of the other Federal Circuits which have dealt with this issue. This conflict created by the Fourth Circuit, Employer respectfully submits, must be resolved by the Supreme Court.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE CONSIDERATION TO BE GIVEN TO TURNOVER IN A BARGAINING UNIT IN DETERMINING THE APPROPRIATENESS OF A BARGAINING ORDER.

The Administrative Law Judge in the instant case refused to allow Employer to present evidence of the extensive turnover in the bargaining unit between the time of the labor election and the beginning of the hearings. He also would not allow a proffer to be made as to said turnover; the extent of the turnover is therefore not in the record. Neither the Board nor the Fourth Circuit Court of Appeals disturbed the Administrative Law Judge's ruling. In fact, neither the Board nor the Court addressed itself to this ruling of the Administrative Law Judge.

The Employer was prepared at the hearing to show that of the 62 employees then in the bargaining unit only 16 had been there at the time of the election and of those 16 only 7 had indicated interest in the Union by signing authorization cards. This extensive turnover was, Employer submits, an appropriate factor to be considered in determining whether a bargaining order was needed to remedy the unfair labor practices of the Employer.

With the exception of the Ninth Circuit, and now the Fourth Circuit, all the Circuit Courts which have considered whether turnover in the bargaining unit should be a factor, have determined that it should be. The Second, Fifth, Seventh and D.C. Circuits have held that turnover in the work force is a factor that should be weighed by the National Labor Relations Board when determining the appropriateness of a bargaining order. In *NLRB v. Ship Shape Maintenance Co.,* 474 F.2d 434 (D.C. Cir. 1972), the Court stated at page 443:

> ". . . [I]n the instant case, enforcement of the Labor Board's proposed bargaining order would

> impose representation upon a current unit of employees, the vast majority of whom were neither employed by the Company at the time of the unfair labor practice violation nor meaningfully affected by its commission. Such enforcement would ignore the fact that the N.L.R.A. expressly protects the right of employees to refrain from organizational activities if they so desire."

Similarly, in *NLRB v. General Stencils, Inc.*, 472 F.2d 170 (2nd Cir. 1972) the Court refused to enforce a Board bargaining order and stated that this might be an appropriate case for the Board to reconsider employee turnover. In *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 448 (5th Cir. 1970) the Court disagreed with the Board's refusal to consider turnover in the bargaining unit, saying:

> ". . . [W]e think that . . . the Board should have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified."

In *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973) the Court held that a reduction in the employer's work force was a factor which the Board should have considered since it was the present work force which would be denied the freedom of choice available in an election, and the present work force was substantially different from the one existing at the time of the unfair labor practices.

Only the Ninth Circuit, prior to the instant case, had agreed with the Board's position that turnover should not be considered. See, *NLRB v. I.B. Foster Company*, 418 F.2d 1 (9th Cir. 1969). The facts in that case, however, involved only turnover in the bargaining unit which occurred *after* the administrative law hearings. Thus, the Ninth Circuit has only held that *post-hearing* turnover in the bargaining unit is not a factor to be

considered; it has not addressed the question of *pre-hearing* turnover.

The Second, Fifth, Seventh and D.C. Circuits *supra* all held turnover — regardless of when it occurs — to be a relevant factor the Board should consider. Only the Fourth Circuit, in the instant case, has held that *pre-hearing* turnover should not be considered by the Board.

The decision of the Fourth Circuit only serves to deepen the split between the Board and the Circuits on the issue of turnover as a factor for consideration by the Board in issuing bargaining orders. It would seem clear under *NLRB v. Gissel*, 395 U.S. 575 (1969) that a bargaining order is the remedy of last resort — only to be used when the preferred remedy of a fair election is impossible. Certainly turnover in the bargaining unit — be it pre-hearing or post-hearing — is an important element to be considered in determining whether in fact a fair election can be held or whether a bargaining order must be issued.

Employer submits, therefore, that it is essential that the Supreme Court resolve this conflict which concerns a matter closely related to the Section 7 right of employees under the Taft-Hartley Act to decide whether or not they want to be represented by a union — a right which is abrogated by the imposition of a bargaining order.

3. EMPLOYER WAS DENIED BY ADMINISTRATIVE LAW JUDGE ITS DUE PROCESS RIGHT TO IMPEACH TESTIMONY OF NLRB WITNESSES AND TO MAKE OFFERS OF PROOF TO PRESERVE THE RECORD.

Despite the well-settled state of the law that a party has the right to attempt to impeach the testimony of adverse witnesses, the Fourth Circuit in the instant case failed to rule as to the impropriety of the

Administrative Law Judge's evidentiary rulings which prevented Employer from impeaching the testimony of the General Counsel's key witnesses. The Administrative Law Judge would not permit testimony directed toward establishing bias on the part of the key witness for the General Counsel for the Board. The Administrative Law Judge would also not permit testimony and evidence intended to establish a prior inconsistent statement on the part of one of the charging parties.

The Fourth Circuit, in its opinion, does not even address these issues, despite the clear state of the law in various circuits that it is a denial of due process to prevent a party from introducing testimony that may impeach testimony offered against it. See, e.g., *NLRB v. M. Koppel Co.*, 412 F.2d 681 (3rd Cir. 1969); *NLRB v. Capitol Fish Co.*, 294 F.2d 868 (5th Cir. 1961); *NLRB v. Burns*, 207 F.2d 434 (8th Cir. 1953). Indeed, the Fourth Circuit itself has in the past recognized this right of a party to impeach testimony against it. See, *G & P Trucking Co., Inc. v. NLRB*, ___ F.2d ___, 92 LRRM 3652, (4th Cir. 1976) and *NLRB v. United Brass Works, Inc.*, 287 F.2d 689 (4th Cir. 1961).

Similarly, it is an irrefutable statement of the law that a party must be given the opportunity to put in the record a fair statement of what it intended to prove, so that an appellate court can properly pass upon the challenged ruling of the trial judge. Refusal to allow a proffer constitutes a denial of due process. *U.S. v. James, et al.*, 510 F.2d 546 (5th Cir. 1975); *Pennsylvania Lumbermens Mutual Fire Insurance Co. v. Nicholas*, 253 F.2d 504 (5th Cir. 1958); *NLRB v. Tennessee-Carolina Transportation, Inc.*, 226 F.2d 743 (6th Cir. 1955). See, also, Rule 103(a)(2), Federal Rules of Evidence.

In the present case, the Administrative Law Judge on two occasions refused to allow Employer to make a

proffer. In both instances, the excluded evidence concerned matters which were vital to the Employer's case — turnover in the bargaining unit and testimony intended to impeach the credibility of a charging party in the case. The Court in affirming the decision of the NLRB made no reference to these glaring procedural errors.

Thus, Employer was denied the opportunity to fully present its case before the Administrative Law Judge — a clear violation of Employer's right to due process; a violation to which the Fourth Circuit, incredibly, never addressed itself.

CONCLUSION

It is respectfully submitted that Employer's Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit should be granted for the following reasons:

1. The questions raised in this case concerning the issuance of a bargaining order based upon an authorization card majority, misrepresentation in the solicitation of cards, and pre-hearing turnover in the bargaining unit are issues which stem directly from the Supreme Court's ruling in *Gissel, supra.* These issues are of great concern to labor practitioners across the country who represent management because the NLRB has extended the Supreme Court's *Gissel* decision beyond proper bounds. Yet the Fourth Circuit, in this case, has approved the NLRB's position without regard to the numerous decisions from other Circuits holding just the opposite.

2. By affirming the rulings of the Administrative Law Judge respecting certain evidentiary matters, which rulings resulted in an unquestionable denial of due process to Employer, the Fourth Circuit has rendered a decision which conflicts with every reported

decision of every federal Circuit Court which has commented on the evidentiary and procedural rights of parties at an NLRB hearing.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 76-1738

Multi-Medical Convalescent and Nursing Center of Towson,
Petitioner,
v.
The National Labor Relations Board,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

Argued January 10, 1977
Decided February 24, 1977.

Before WINTER, CRAVEN and BUTZNER, Circuit Judges.

CRAVEN, Circuit Judge:

On the employer's petition to review, and the cross-application of the National Labor Relations Board for enforcement, we conclude, for reasons to be briefly stated, that the Board's order should be enforced.

I.

The Board found that the active manager of the petitioner (Mrs. Burkoff) told the employees that if they

voted for the Union she would have to grant pay increases demanded by the Union, that she could not afford to pay such increases, and that she would have no alternative but to lay off some employees. Previously Mrs. Burkoff had told the employees that they would receive raises in pay as the number of patients increased in the nursing center. The Board viewed the statements as the typical "carrot and stick approach" and concluded that the speech was not a "carefully phrased" prediction based on objective fact conveying demonstrably probable consequences beyond respondent's control. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). We agree that the employer's expression of views, argument or opinion, fully protected by the First Amendment and by the Act, 29 U.S.C. §158(c), was not so carefully exercised as to screen out intended implications of "threat of reprisal or force or promise of benefit" in violation of 8(a)(1). 29 U.S.C. §158(c).

II.

The Board found that as of April 19, 1975, the Union had authorization cards for 20 of the 39 employees and that as of April 23 it had 22 authorization cards. The Company's most serious objection to the authorization cards related to those of Clark and Owens who were told by Union representatives that their cards were to help the Union get an election. The Board determined that these cards should be counted because the employees were not told that the cards were *solely* for the purpose of obtaining an election and because the cards contained a perfectly clear declaration that the signer designated the Union as bargaining agent. In *Gissel, supra,* a unanimous Supreme Court approved the Board's Cumberland rule, 144 N.L.R.B. 1268 (1963), as applied in one of the cases consolidated under the *Gissel* name and as applied in that case (*General Steel*). 395 U.S. at 584, n.5. In approving the Cumberland rule, the Court said:

> [W]e think it sufficient to point out that employees shall be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

Id. at 606.

The Board concluded, on substantial and indeed, plenary evidence of unfair labor practices directed toward destruction of the union majority, that the application of the Board's traditional remedies would not serve to eliminate the lingering coercive effect of unfair labor practices. Concluding that a fair new election had been rendered highly improbable by the conduct of the employer, the Board ordered the employer to recognize the Union and to commence bargaining on the basis of the signed authorization cards of a majority of the employees. It is clear that where practices have been engaged in that "have the tendency to undermine majority strength and impede the election processes" the Board has authority to issue a bargaining order. *Gissel,* 395 U.S. at 614.

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Id. at 614-615.

III.

One aspect of the case gravely concerns us. It is the apparent disposition of the administrative law judge to adhere rigidly to exclusionary rules of evidence and, if at all in doubt, to curtail development of potentially relevant lines of inquiry. This is brinksmanship, and here the administrative law judge very nearly tumbled over the brink. For example, Mrs. Burkoff was asked whether at the time she made her speech to employees the nursing home was making or losing money. The

administrative law judge interposed his own objection and refused to permit the witness to answer on the ground that it would be a conclusion and would require testimony of an accountant to determine its truth, and on the further ground that the best evidence would be the books of the corporation. If there were nothing more, we would be inclined to vacate and remand, but later the judge saved himself by indicating he would modify his ruling if counsel was prepared to bring in the books to be examined. In response, counsel ambiguously advised that financial statements are normally year-end and that although he would be able to bring the accountant, he was "not prepared to do that at this moment." Because of this circumstance, and because there is nothing in the record in the nature of objective evidence indicating that the Union had demanded higher wages or would soon do so, we think the administrative law judge skirted the edge of the precipice.

We are also concerned that in considering the reasons why Peay was discharged the judge refused to hear evidence that other employees, not affiliated with the Union, were dismissed for a reason allegedly similar to the one assigned by the company with respect to this union adherent. After Mrs. Burkoff had been allowed to testify that she had terminated "about four" employees for insubordination, she was asked whether she could identify them. Thereafter ensued a colloquy between the administrative law judge and company counsel. The judge indicated that he would not permit going into the circumstances of the discharge of other employees "at length" and having them called as witnesses, and also indicated that Mrs. Burkoff's statement that "four employees were terminated for insubordination" would stand. Counsel for the company apparently acquiesced in the ruling and made no further proffer. Ex. App. 100. That sort of evidence goes to whether the company departed from its customary practice in discharging union adherents, which goes to the question of invidious motivation. The evidence supporting the

Board's decision that Peay's discharge was for union activity was very strong. There was, indeed, so much of it that the administrative law judge summarized the factors he took into account and the summary comes to one-half page of his decision.[1] Because the evidence is very strong and because of counsel's apparent acquiescence to the ruling cutting off further development of the facts with respect to the alleged termination for insubordination of other employees, we think the error does not invalidate the proceedings. But it would have been better practice for the administrative law judge to

[1] The following is an excerpt from the administrative law judge's "Conclusions":

> My decision on the question of Peay's discharge is based, *inter alia*, upon the following considerations in summary: (1) Peay's unguarded leadership activities on behalf of the Union. (2) Burkoff's hostile reaction upon finding Peay attended the Board representation hearing on April 21, and her expressed belief that Peay was a paid union organizer. (3) Burkoff's use of Connor as an espionage agent, and his invasion and violation of Peay's confidence in obtaining and reporting to Burkoff on Peay's union conduct, including the remark in question critical of Burkoff. (4) The fact that on April 29 Connor was engaged with Peay in a two-party conversation, purportedly overheard from a distance by two employees who were not called to testify. (5) Connor's written report to Burkoff on April 29, pointing to Peay as a "rabble-rouser" and as a dedicated proponent of the Union, — while quoting Peay as stating she had heard Burkoff is a crook. (6) The essential nature of Peay's remark regarding Burkoff. It was made in limited reference to the reliability of the Union's financial statements given to Connor by Burkoff for campaign propaganda. It appears as an offhand comment by an obviously unsophisticated domestic-type worker. It was not articulated for general circulation and, in my opinion, was not uttered with intended or understood malice against Burkoff personally. (7) Burkoff decided summarily to discharge Peay before confronting her, — Connor's protests notwithstanding that he did not intend such a result and that it was wrong. And Connor was told he had to back her up; "administrators have to stick together."

Jt. App. 49.

have permitted testimony, albeit briefly, as to the conduct of the other employees said to have occasioned discharge for insubordination.

In a nonjury trial, whether in the district court or before an administrative law judge, little harm can result from the reception of evidence that could perhaps be excluded. This is so because the judge, trial or administrative, is presumably competent to screen out and disregard what he thinks he should not have heard, or to discount it for practical and sensible reasons. On the other hand, to exclude that which is competent and relevant by mechanistic application of an exclusionary rule is exceedingly dangerous to the administrative or trial process and may well result in vacating the judgment or order on procedural due process grounds.

It has long been settled[2] that an appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. *Builders Steel Co. v. Commissioner,* 179 F.2d 377 (8th Cir. 1950). See 2B W. Barron & A. Holtzoff, *Federal Practice and Procedure* §972 (Wright ed. 1961).

Professor Wright tells us that "[t]he attitude now governing has been strongly stated by Judge Sanborn: 'In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not.'" 2B W. Barron & A. Holtzoff, *supra,* at 268.

The appellate courts have taken a similarly critical view of exclusionary rulings by administrative agencies. *Samuel H. Moss, Inc. v. FTC,* 148 F.2d 378, 380 (2d Cir.), *cert. denied,* 326 U.S. 734 (1945). Thus, we strongly advise administrative law judges: if in doubt, let it in.

[2] Innumerable decisions are collected in West's *Modern Federal Practice Digest* under the key number "Courts" 406.6(8)(i), *Cases tried without jury,* 15 Modern Federal Practice Digest 466.

IV.

We have carefully considered the other issues presented by the employer and find them without merit.

We hold that substantial evidence on the record as a whole supports the Board's findings that the nursing home violated §8(a)(1) by threatening employees with layoffs if they voted for the Union, and by coercively interrogating employees about union activities and conducting an espionage campaign. We hold that the nursing home violated §§8(a)(3) and (1) of the Act by discharging employees Wilma Peay and Vera Owens. For the reasons stated, we also hold that the nursing home violated §§8(a)(5) and (1) of the Act by refusing to recognize the Union as majority representative of its employees and that a bargaining order was not inappropriate to effectuate the policies of the Act.

Order Enforced.

APPENDIX B

United States of America
Before the National Labor Relations Board

Cases 5-CA-7287, 5-CA-7521, and 5-RC-9304

Multi-Medical Convalescent and Nursing Center of Towson
and
District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO

DECISION AND ORDER

On March 24, 1976, Administrative Law Judge Benjamin B. Lipton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. General Counsel filed cross-exceptions and a memorandum in support thereof, and Respondent filed a brief in response to the cross-exceptions of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] find-

[1] Respondent has excepted generally to the Decision of the Administrative Law Judge, contending that he exhibited bias and hostility against Respondent which resulted in prejudice to Respondent and a denial of due process. We have carefully examined the record and find no basis for those exceptions.

ings,[2] and conclusions of the Administrative Law Judge to the extent consistent herewith and to adopt his recommended Order as modified herein.

1. The Administrative Law Judge found that Respondent's unfair labor practices were sufficiently egregious to warrant a bargaining order under *N.L.R.B. v. Gissel Packing Co., Inc.*[3] He further found that under our decision in *Trading Port, Inc.*,[4] the bargaining order should be dated from April 21, 1975, the date on which the Union had authorization cards from the majority of Respondent's employees in an appropriate unit, as well as the date that Respondent embarked on a clear course of unlawful conduct. We agree with these findings.

The Administrative Law Judge found it unnecessary to reach the issue of whether Respondent violated Section 8(a)(5) of the Act because it was not alleged in

We have further carefully reviewed the instances in which the Administrative Law Judge limited certain testimony, to which Respondent has also excepted. The only exclusion of possibly relevant evidence was that which Respondent sought to adduce to impeach the testimony of witness Conners. That evidence, intended to impeach Conners'credibility generally, concerned the circumstances under which he left Respondent's employ, and the Administrative Law Judge stated that at most this would discredit Conners only as to the facts concerning his departure, which were not in issue. It is well established that an Administrative Law Judge can discredit a portion of a witness' testimony without discrediting the witness generally. Under the circumstances, therefore, we do not find that the exclusion of this evidence was prejudicial.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] 395 U.S. 575 (1969).

[4] 219 NLRB No. 76 (1975).

the complaint. We disagree. Although the complaint did not allege an 8(a)(5) violation, we deem it appropriate to make such a finding here inasmuch as that issue was fully litigated at the hearing and all of the elements of such violation are fully established by the record.[5]

Thus, the parties stipulated, for purposes of the representation proceeding, that on April 21, 1975, the Petitioner orally requested recognition as exclusive collective-bargaining agent and that on the same date the Employer orally refused to grant such recognition unless and until the Petitioner was certified by the Board. The parties further agreed as to the appropriateness of the unit. Additionally, the record establishes that on April 21 the Union had authorization cards from 20 of Respondent's 39 unit employees.

Based on the foregoing we find, contrary to the Administrative Law Judge, that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union on and after April 21, 1975.[6]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Multi-Medical Convalescent and Nursing Center of Towson, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Insert the following as paragraph 1(e) and reletter the present paragraph 1(e) and 1(f):

"(e) Refusing to bargain collectively with District 1199E, National Union of Hospital and Health Care

[5] Respondent cannot claim surprise by this additional finding inasmuch as the litigation of the remedial bargaining order, including the Union's majority status, the demand, and the refusal, adequately apprised Respondent of the likelihood of such a finding.

[6] *Schwab Foods, Inc., d/b/a Scotts IGA Foodliner,* 223 NLRB No. 43 (1976).

Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive bargaining representative of the Respondent's employees in the following appropriate unit:

> All regular full-time and regular part-time service and maintenance employees, excluding registered nurses, licensed practical nurses, office clerical employees, professional employees, guards, and supervisors as defined in the Act."

2. Substitute the attached notice for that of the Administrative Law Judge. Dated, Washington, D.C. June 30, 1976.

	BETTY SOUTHARD MURPHY,	Chairman
	JOHN H. FANNING,	Member
	JOHN A. PENELLO,	Member
(SEAL)	NATIONAL LABOR RELATIONS BOARD	

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT ask you anything about your union activities, or the union activities of your fellow employees, in a manner which would coerce you regarding your rights under the National Labor Relations Act.

WE WILL NOT threaten you with discharge, layoff, or other punishment because of your activities or sentiments in behalf of District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, or any other labor organization.

WE WILL NOT assign or use our security guards, or any other agents, to spy and report to us on your union activities or sentiments.

WE WILL NOT discourage membership in, or activities in behalf of, District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, or in any other labor organization, by discharging employees or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to bargain collectively with District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive bargaining representative in the appropriate unit described below. The appropriate unit is:

> All regular full-time and regular part-time service and maintenance employees, excluding registered nurses, licensed practical nurses, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed in the National Labor Relations Act, which include:

> To engage in self-organization
> To form, join, or help unions
> To bargain collectively through a representative of your choosing
> To act together for collective bargaining or other mutual aid or protection
> To refuse to do any or all of these things.

WE WILL, upon request, recognize and bargain with District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the appropriate unit. And, if an understanding is reached, embody such understanding in a signed agreement.

Since it has been found that we unlawfully discharged Wilma Peay and Vera Owens — WE

> WILL offer them immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and WE WILL pay them for the earnings they lost because of the discrimination against them, plus 6-percent interest.

All our employees are free to become or remain, or refrain from becoming or remaining, members of a labor organization.

MULTI-MEDICAL CONVALESCENT AND NURSING CENTER OF TOWSON
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 1019, Hopkins Plaza, Baltimore, Maryland 21201, Telephone 301-962-2772.

APPENDIX C

United States of America
Before the National Labor Relations Board
Division of Judges

Case Nos. 5-CA-7287, 5-CA-7521 and 5-RC-9304

Multi-Medical Convalescent and
Nursing Center of Towson
and
District 1199E, National Union of Hospital and
Health Care Employees, Retail, Wholesale
and Department Store Union, AFL-CIO

DECISION

Statement of the Case

BENJAMIN B. LIPTON, Administrative Law Judge: Cases Nos. 5-CA-7287 and 5-CA-7521 present a consolidated complaint by the General Counsel[1] alleging that Respondent engaged in certain independent violations of Section 8(a)(1); that Respondent discharged Wilma Peay and Vera Owens in violation of Section 8(a)(3); and that a remedial bargaining order (based on evidence of a majority of union authorization cards) should be issued. Respondent denies the alleged violations. In Case No. 5-RC-9304, pursuant to a Decision and Direction of Election by the Regional Director, an election was conducted on May 14 in a unit generally consisting of the unlicensed service and maintenance employees at Respondent's nursing home. The results of the election show that, of 34 eligible

[1] All dates are in 1975, unless otherwise shown. The Union's charge in 5-CA-7287 was filed on May 12, as to which the complaint issued on July 9 and was amended on July 25. In 5-CA-7521, the charge was filed on September 10, amended on October 29, and the complaint issued on the latter date.

voters, 15 votes were cast for the Union, 16 votes were cast against the Union, and 1 vote was challenged. The Union filed timely objections. On July 25, the Regional Director issued his formal report on the objections. As to Objection No. 1, he found substantial and material issues of fact and ordered consolidation of the complaint and representation cases for the purpose of hearing. Certain of the election objections in issue are broadly coextensive with the complaint allegations of Section 8(a)(1).

On September 16, September 24, September 25, October 21, 1975, and January 14, 1976, a hearing in this consolidated proceeding was held before me in Baltimore, Maryland. Posthearing briefs from the General Counsel and Respondent have been duly considered.

Upon the entire record in the cases, and from my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is engaged in the operation of a proprietary nursing home in Towson, Maryland. During the year preceding issuance of the initial complaint, Respondent had a direct inflow in interstate commerce of materials valued in excess of $50,000, and had gross revenues in excess of $100,000. It is admitted, and I find, that Respondent is engaged in commerce, and that the Union (as named in the case caption) is a labor organization, within the meaning of the Act.

II. The Unfair Labor Practices

A. *Introductory Statement*

Respondent's facility involved herein commenced operation on July 1, 1974. (Mr. and Mrs.) Alex and Rose Burkoff are Respondent's "administrators," i.e., holding the highest management positions. Rose Burkoff, as she testified, "is" the administrator at another facility called the Mt. Sinai Nursing Home, at an undisclosed

location.[2] She gave testimony, in substance: The Union has had a collective-bargaining agreement with Mt. Sinai since 1969; she and the Union's president had a "gentleman's agreement" reached several weeks before July 1, 1974, that he would "let her get off the ground floor" before he tried to unionize Respondent, and Respondent would recognize the Union on the basis of a card count; on February 26, a meeting took place at the office of Respondent's counsel for the purpose of conducting a card count, and no agreement was reached that the Union had established a card majority. It is evident that, on December 23, 1974, the Union filed a representation petition, — clearly indicative that the Union was proceeding with its organizational campaign at Respondent. For reasons not shown, the Union withdrew its petition on January 20. On April 7, the Union again filed a certification petition. On April 21, the parties met at the Board office and entered into a stipulated record in the representation case. As already indicated, a directed election was held on May 14, following which the Union filed objections alleging interference with the election.

Allegations appear in the testimony that threats or predictions of layoff and firing were made to employees by particular supervisors and an agent of Respondent. Relating to the precise question of whether an employer engages in permissible predictions of adverse affects of unionism, as contrasted with coercive and unlawful threats, the Supreme Court in *Gissel* was explicitly sensitive to "the economic dependence of the employees on their employer and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[3] It is well to note that here the unit employees are essentially unskilled menial help and, within my observation, are

[2] The corporate or financial relationship, if any, between these two facilities has not been shown.

[3] *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618.

relatively unsophisticated. Therefore, it is fair to say that these employees are more that normally apt "to pick up intended implications" and statements made to them without comprehending subtle distinctions. These are circumstances which are properly part of the context in which the issues arose.

In a defensive vein, Respondent seeks to portray an image that it reacted benevolently to the Union's organizational efforts and that it was receptive to recognition of the Union on the basis of a voluntary card check. I regard such arguments as a sham, particularly in light of Respondent's actual conduct and tactics hostile to union representation and clearly intended to thwart the employees' support of the Union.

B. *Restraint and Coercion*

I. Mildred Shiflett

Shiflett is the supervisor of housekeeping, with about six employees in that department. During the morning on February 28, agents of the Union, David Simon, Carolyn Green and one other, were on the premises of Respondent. After a telephone call to Burkoff, who was then away from the facility, certain supervisors made arrangement to permit the employees who so desired to meet with these agents in the employees' lounge.[4] The employees were paged by loud speaker.[5] Employees Josephine Medley, Eunice Brandon and Vera Owens testified for General Counsel; employee Rosalee Thompson and Supervisor Shiflett testified for Respondent. Each identified the others as being present. Directly concerned with the question of whether Shiflett engaged in coercive conduct, my findings are in the affirmative.

[4] Rose Burkoff had earlier granted Simon's request for leave to enter the home for solicitation purposes.

[5] On March 18, Union Agents Simon and Green came again to the nursing home. On this occasion, Burkoff allowed only Green, and not Simon, to enter the facility. Employees were paged, and were solicited by Green in the employees' lounge for a limited time. No allegations are involved relating to this visit.

Shiflett spoke to some of the housekeepers in the lobby before they entered the employees' lounge to meet with the union agents. I credit Brandon's testimony, in substance as corroborated, that Shiflett said — Burkoff did not want the employees to sign cards, and if they signed the cards (i.e., selected the Union as representative) three of the housekeepers would have to be laid off, because Burkoff could not afford to pay union wages. Medley's version placed such a statement by Shiflett as occurring 2 or 3 days after February 28. Thompson testified that, in a conversation with housekeepers about a month after February 28, Shiflett indicated that, if the Union came in, some employees would be laid off because "we would have a (union) raise." And Burkoff could not "afford to pay those prices." Then Shiflett added that she did not know who would be laid off; it could even be herself.[6] Medley also testified, as did Owens, that on February 28, Shiflett told the employees that, if they signed for the Union, they would be "fired." In the circumstances shown, with the Union permitted to solicit within the facility, such a direct threat of discharge for signing cards would seem implausible. I cannot conceive that Brandon, being present, would not have heard such a threat. This significant discrepancy among General Counsel's witnesses, present at the same event, is not elsewhere clarified. I am therefore constrained not to find that Shiflett stated such a threat of firing employees, and dismiss this latter allegation in the complaint.

Medley also testified that, on February 28, Shiflett was in the employees' lounge, saw her sign an authorization card, took the card out of Medley's hand, and threw it in the trash can. I accept this aspect of her

[6] Shiflett testified that, sometime subsequent to February 28, she was asked by some employees whether they would be laid off or fired if the Union came in, and she replied she did not know — "Some of us will probably go and I may be one of them." In her direct examination, Burkoff responded with a denial to the question whether she told Shiflett at any time that, if the Union got in, 50 percent of the employees would be "fired."

testimony, corroborated by Owens who witnessed the occurrence. Shiflett testified that, before the meeting started, one of the union agents in the lounge (in the presence of other employees) handed her a union card. She said, — "here is what I think about your card," — and "tore it up and threw it in the trash can."[7] Shiflett and Thompson testified that, after the meeting, employees were sitting around the lounge. Thompson first asked Shiflett what to do with the cards and then took her own card and other blank cards lying on the table and threw them in the trash can. General Counsel has not alleged and does not argue that an independent violation was committed. I deem this evidence pertinent to show the strong hostility of Supervisor Shiflett to the signing of union cards, which attitude she pointedly displayed to employees on February 28. Elsewhere Shiflett testified, beyond credence, that at all times she was unaware that any of the housekeepers had sympathies for the Union. The elicited denials of Shiflett and Thompson, to the extent inconsisent with the findings above, are not credited.

In my opinion the violation is substantially the same in Shiflett's uttering the threat of layoffs, — whether or not she specified that 3 of the 6 housekeepers, or 50 percent of them, would be so terminated; or whether or not it occurred on February 28, within a few weeks thereafter, or on more than one occasion.

If an employer undertakes to inform employees of the effects unionization will have on his company, the prediction "*must be carefully phrased* on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . ." (Emphasis added.)[8] What Shiflett stated to the employees was not a prediction capable of objective proof of consequences beyond Respondent's control. The free collective-bargaining process does not permit

[7] At another point, Shiflett flatly stated she did not go into the lounge "while the union was there." And Thompson testified to corroborate such fact.

[8] *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618.

the advance assumption that any concession is required by either side. (Section 8(d)) Respondent could not objectively forecast that dealing with the Union as a statutory bargaining representative would inevitably result (1) in higher employee wages and benefits, and (2) in its inability to meet such higher cost without having to reduce the current complement of employees. In any case, it cannot be regarded that the language of Shiflett was so "carefully phrased" as to eliminate reasonable implications in the minds of the employees that the projected layoffs were within Respondent's discretion and control. The Supreme Court in *Gissel* found on the precise issue that "the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of economic realities."[9] I arrive at the same conclusion here, and find Shiflett's threat of a layoff seriously violative of Section 8(a)(1).

2. William C. Connor

Connor is employed as a public school teacher and as a part-time security guard under the auspices of the Pinkerton company. From October 1974 to May 1975, he was assigned as a guard at Respondent's premises. He worked along with Rose Burkoff almost on a daily basis and had occasion to discuss with her the union campaign.

On April 21, after Burkoff returned from the Board hearing in the representation case, she called Connor into her office. She mentioned that Wilma Peay and Katie Woods were at that meeting and she was particularly surprised to see Peay. She wanted him to "feel out," to see if he "could discover the feelings of the employees as to their pro or con union," since he had a good rapport with them."[10] And she asked him to report

[9] *Id.* at 619. And see, e.g., *N.L.R.B. v. Jimmy-Richard Company, Inc.*, 90 LRRM 3258 (C.A. D.C. December 8, 1975).

[10] He testified that in fact he had a good relationship with the employees.

back to her. She gave Connor copies of the Union's financial statements, which she explained to him. Among other things, she told him, if the Union won the election, she could not afford to pay union wages, and if she had to, she would run the facility with LPN's (licensed practical nurses) and RN's (registered nurses). Thereafter, on several occasions with different employees, Connor had conversations to find out what their sympathies were regarding the Union. Mainly he spoke to about 10 employees on the 3 to 11 p.m. shift. He discussed with them the financial statements of the Union's local and international.[11] He tried to convince them that the Union was in financial difficulties and the parent was obviously helping the local. The discussion was "more or less about who was feeling prounion or antiunion." He said Burkoff had told him that, if the employees voted for the Union, she would have to run the staff with LPNs and RNs. He expressed his own opinion while he tried to impress upon the employees that it could probably mean their jobs, that Burkoff was losing money, could not afford union wages, and would have to lay off some of the employees. They should remember that, although there might be benefits deriving from the Union, Burkoff would still have the "final say-so as far as hiring and firing." After April 21, he had discussions with Burkoff from time to time, and he is sure that he verbally reported to her the names of employees and their feelings towards the Union. On April 29, he wrote a note to Burkoff and left it on her desk. As will be specifically shown *infra,* he commented on the general attitudes of the employees, and specifically concerning

[11] Burkoff testified that Respondent distributed copies of the Union's financial statements to each supervisor and placed a "batch" of them on the desk where Connor normally sat. At the same time, she denied that she ever told Connor to distribute these statements, and denied she had any information that Connor was involved in finding out the employees' sentiments concerning the Union. She answered that she does not care one way or the other whether the Union comes into Respondent's facility.

the union activities of Peay and Woods. After Peay was discharged on April 30, Burkoff wanted him to stop feeling the employees out, to "drop the whole thing," because it was getting too involved.[12] The foregoing in essence reflects the account given by Connor. Burkoff's denials as to portions of these findings[13] are not credited. My distinct opinion is that her testimony in numerous instances was shifting, evasive, dissembling and generally untrustworthy.

Initially, I find that Respondent authorized and utilized the services of the security guard, Connor, to operate covertly among the employees, exploiting their confidence and trust, in order to ascertain and report to Respondent, *inter alia,* the identities of those employees who favored and those who opposed the Union. This is clearly within the concept of employer espionage early condemned by the Board and the courts as a fundamental intrusion into the protected activities of employees.[14] Accordingly, it is held, within the framework of the complaint, that such conduct by Respondent violated Section 8(a)(1) of the Act.

There are subsidiary questions whether certain statements of Connor in the course of his "feeling out" the employees are imputable to Respondent as unlawfully coercive. In my opinion, the evidence does not permit the inference that the employees were reasonably led to believe that Connor, in what he told them, was an agent, supervisor or spokesman for Respondent, albeit he was an authorized agent in regard to his

[12] Burkoff testified she merely told Connor to stop interfering with the employees.

[13] Such as, that she asked him to feel out the employees and to report back, that she provided him with the formal statements of the Union, or that he gave her any oral reports. Much of this testimony was elicited by leading questions.

[14] E.g., *Consolidated Edison Co. v. N.L.R.B.* 305 U.S. 197, 230 (1938); *Harvey Aluminum, Inc.,* 139 NLRB 151, 200, and cases cited therein. And see *Rust Sales Co.,* 157 NLRB 1681, concerning the use of a detective agency to spy and report on employees' union activities.

undercover assignment.[15] Therefore, the specific complaint allegations that he engaged in coercive interrogation of employees and that he warned employees of termination because of their union sympathies — cannot stand.[16]

3. Al Rhine

He hired and directly supervised Jacqueline Brooks, a dietary aide. Brooks was active in soliciting union cards. On April 22, Rhine asked Brooks if she had attended the Board (representation) hearing the previous day. She replied in the negative. He indicated that Burkoff had asked him to find out if any of his girls were at the hearing. He told her Burkoff said, if the Union got in, he would have to let go 50 percent of his employees because she could not afford to pay union wages.[17]

[15] Cf., *Kolpin Brothers Company, Inc.,* 149 NLRB 1378, enfd. 379 F.2d 488 (C.A. 7), and *Atlas Engine Works, Inc.,* 163 NLRB 486, where the employees enlisted by the employer to engage in antiunion activities used threats and coercive arguments within the direct authority given by the employer.

[16] Moreover, there is no evidence of actual conversations and therefore no basis for applying the usual tests for determining whether the speech used constituted coercive interrogation. And his statements concerning the possibility of layoffs and loss of jobs were characterized as reflecting his personal opinion. An area of doubt is presented whether Respondent should be held accountable for his statement to employees, that Burkoff told him, if the Union came in, the facility would be run by LPNs and RNs. There is testimony elsewhere regarding such a statement from Respondent with substantial ambiguity as to the meaning intended and interpreted. A witness for General Counsel, employee Jacqueline Brooks, testified that Burkoff indicated at a meeting with employees that, if the employees engaged in a strike, she would have the LPNs and RNs run the building. It is plausible and probable that, in essence, this is what Burkoff sought to convey to Connor. In the particular circumstances, I find no independent violation in this statement to employees made by Connor. Cf. *American Door Company, Inc.,* 181 NLRB 37.

[17] Rhine was not called by Respondent.

In the context of the established union animus and contemporaneous unfair labor practices, I find that Rhine engaged in coercive interrogation of Brooks.[18] In addition, Section 8(a)(1) was violated in *Rhine's* threat that employees would be laid off if the Union were selected as their representative.

4. Rose Burkoff

She spoke to assembled employees at a preelection meeting on May 5.[19] She testified that the purpose of the meeting was to clarify "rumors running rampant" through the facility. These rumors were brought to her attention through the various supervisors, and not by any employees. For her part, Marian Causey, an assistant to Burkoff and the "administrator and head of recreational therapy," testified that Burkoff "planned the meeting" at the request of certain employees who had approached her, Causey. The rumors described by Burkoff were, e.g., that there were going to be wholesale firings; that she was going to run the place with LPNs and RNs; and that if they signed cards they would be terminated. As already shown, certain statements of this nature had earlier been made to the employees by supervisors, and by the guard, Connor.

General Counsel's witnesses gave testimony concerning the meeting, in relevant substance, as follows: By Denise Erwin: Burkoff said, if the Union came in, there would have to be paid increases, and she would have to lay off employees because she could not afford to pay the increases. By Josephine Medley: Burkoff stated she could not afford to pay union wages and, if the Union came in, she would have to lay off some employees. She also said that, when she got some more money, she would divide it and give her help more money. By Eunice Brandon: Burkoff said she could not afford to

[18] *Blue Flash Express, Inc.*, 109 NLRB 591.

[19] Minor variations in the date were given by certain witnesses. It is undisputed that only one meeting was held about this time preceding the scheduled election on May 14.

pay union wages. If she got more patients, she would pay even more than the Union would. By Jacqueline Brooks: Burkoff asked the employees to vote no in the election because she could not afford to pay union wages. If the Union did get in, the employees would engage in a strike, and she would then have the LPNs and RNs run the building. If the Union did get in, she would have to lay off 50 percent of the people.

Respondent's witnesses testified concerning the meeting. By Virginia Miller: Answering a question, Burkoff said there would be no blanket firing but "there may, however, be layoffs because of lack of funds." If she were forced to raise wages, there were only so many dollars to go around and "only so many employees could be kept." No mention was made of any number or percentage of layoffs. She said that, since it was a new facility, "it was running in the red which was not at all unusual." If the employees stuck by her, when the "census" went up, their pay would also go up. The "census" referred to the number of patients in the facility then about 30 as compared with the capacity of 120. The question was asked whether all the unlicensed people would be fired and the facility run by licensed people. Burkoff answered that this was impossible to do because licensed personnel required more pay than the unit employees. By Edward Rosenquist: Burkoff said there would not be any blanket firing for signing cards. If the Union came in and she had to increase the pay with the same number of staff, she would have to lay off some employees "to accommodate the money she had." She would have to increase the wages if the Union came in. "Theoretically she stated" that if she had to increase the pay, — "it would be logical that she would have to lay off some people." If the employees would "give her a chance to prove herself, then she could try to do her best to accommodate the standards she could set up." She showed them the Union's financial statements and said that the Union's need for members to resolve a deficit problem was the only reason the Union wanted to come in. By Supervisor

Shiflett: Burkoff said, if the Union came in and asked for higher wages, "she could not afford to pay higher wages so she would have to lay some of the employees off." If everybody would stick with her and give her a chance, she would increase the pay when she got more patients. Shiflett herself was repeatedly told about this and she passed it on to her housekeepers. Burkoff said nothing about running the facility with LPN's and RN's. By Supervisor Causey: Burkoff said (in the event the Union came in) "there would have to be layoffs if we did not improve our patient census." If the Union did get in and made such demands for salary . . . it was true there would be layoffs." Answering whether there would be mass terminations if the Union was selected, Burkoff indicated that the employees who remained would certainly have their salaries increased as the patient load increased. By Rose Burkoff: Asked about mass layoffs, she said — if she were placed "in a more difficult position financially then she was already in," she would "have no choice but to lay off some people" because the census then was 35 patients out of 120 beds. She did not tell the employees to "stick with" her but said that, if they gave her a chance, as the census improves she will give them increases. She did not say she would "fire" all nonlicensed personnel and run the facility with RN's and LPN's.

I find, in substance, Burkoff told the employees, if they designated the union in the forthcoming election, that she would have to grant pay increases demanded by the Union, that she could not afford to pay such increases, and that she would have no alternative but to lay off some employees. This essentially reflects the testimony of Erwin and Medley, as well as Supervisors Shiflett and Causey. I regard Burkoff's version as strained and equivocal. Only Brooks testified that Burkoff specified she would have to lay off 50 percent of the unit employees. It is not my finding that such a statement was made by Burkoff at this meeting. Even assuming that it had been made, the result I reach would not be affected. However, it is to be noted that

statements describing a number or percentage of layoffs were earlier made to the employees by Supervisors Shiflett and Rhine, and it may reasonably be assumed they emanated from internal management sources. In the preelection meeting on May 5, Burkoff also emphasized that the employees would receive raises in pay as and if the census of patients increased in the facility.[20] General Counsel has not alleged the promises of wage increases or benefits as violations, and none is found on the state of this record. Nevertheless, it is pertinent to consider from the vantage point of the employees that Respondent was holding out prospects of raises based upon improvement in the census while simultaneously asserting it could not afford to pay union wages and, if the Union came in, it would inevitably result in layoffs. Burkoff made no comment that, if the census improved, Respondent would be able to afford Union-negotiated raises. It is not conceivable that Burkoff's statements on their face were objectively persuasive to the employees that layoffs upon the advent of the Union would result as an economic necessity. Indeed, the likely impact upon them was that of the "carrot and stick" approach in Respondent's efforts to influence them away from the Union. Viewing all the testimony as to the import of Burkoff's statements, it can scarcely be deemed that these were "carefully phrased" predictions based on objective fact conveying demonstrably probable consequences beyond Respondent's control.[21] Rather I find they were thinly disguised threats. Accordingly, upon the reasoning and authority discussed above concerning similar statements made by Supervisor Shiflett, it is concluded that Burkoff's

[20] Observation is made in the general context that, at the time of the hearing on September 24, the unit complement had increased to 62 employees from the 34 employees eligible at the election on May 14, — with the implication that at this later date a substantial increase in the "census" must have been achieved.

[21] *Gissel, supra,* 395 U.S. at 618.

statements depicting the eventuality of layoffs violated Section 8(a)(1) as alleged.

C. *Discharge of Wilma Peay*

Peay was employed from July 22, 1974, until April 30, 1975, as a "nurse's assistant," earning $2.25, then raised to $2.35 an hour, and was admittedly regarded by Burkoff as an excellent worker. She had signed cards, attended union meetings, appeared on behalf of the Union at the representation hearing on April 21, and agreed to be the union steward "if the Union was voted in."

Relating to her discharge, the testimony in material substance of the security guard, Connor, is given credence. The incident relied on by Respondent stems directly from Connors' unlawful conduct of engaging in espionage as to the employees' union activities. Conflicting testimony of Burkoff and Causey is rejected.

On April 21, Connor was summoned and he reported to the office of Burkoff after she returned from the Board hearing.[22] She said she was surprised that Peay, of all people, was at the hearing. Her attorney had informed her that Peay was a member of the Union, and was salaried by the Union to act as an organizer while working for the facility. Peay would not care about losing her job because she was being paid by the Union.[23]

[22] In passing, I note Burkoff's changing testimony, i.e., that she had absolutely no conversations with Connor concerning the Union; then that she did not "specifically" have such conversations; then that it took place only when he brought it up; and finally what they discussed was that "they (the Union) were trying to come in and over and over and over again, they come in and they come in."

[23] Peay testified that, on April 21, Connor informed her of his conversation with Burkoff. Connor related that Burkoff insisted Peay was a paid worker for the Union and wanted her out of there regardless of what they could get on her. He indicated Burkoff also said "she would just have to show those coconut heads who was boss." Connor testified that, as he recalled, the latter statement was made by him on April 30, as will described *infra*. Peay's testimony is taken for the truth of what Connor told Peay, but not for the truth of what Burkoff actually told Connor. The testimony is generally relevant to show such background in consideration of the circumstances attending Burkoff's confrontation with Peay on April 30.

Following April 21, and his espionage assignment arranged that day, Connor undertook discussions with employees, as earlier noted. In the evening on April 29, he prepared a report to Burkoff and left it in a sealed envelope on her desk, *viz.*:

April 29, 1975

Dear Mrs. Burkoff,

In my opinion Mrs. Peay, who gives the outward appearance of being a professional lady, is nothing more than a rabble-rouser. She is saying things like 'I know about Rose Burkoff. I've heard she is crooked.' 'When I go the union will be here.' etc.

Katie Woods is the typical black who needs to be led. She has found a leader in Peay. Woods says she is going to be fired anyway so the hell with it.

Many people, I feel, are afraid to vote no because of the nasty consequences that might follow. Consequences that 1199E is noted for. They feel the names of those who vote against will be known.

The morale of the staff is sinking. Peay walks around letting people know that she doesn't care if she is fired or not. Others are really beginning to 'sweat' their jobs. Some said 'Peay has a husband. What am I going to do. I have to support myself.'

Sincerely,
Bill

On April 30, after he returned home from his teaching position about 3:30 p.m., he received a call from Burkoff to come immediately regarding his note. Soon thereafter in Burkoff's office, she told him she was going to have to terminate Peay because of the statement "calling her a crook." He protested that it was a "hearsay conversation," he didn't intend it to be used in such a way, and he thought it was wrong to terminate her for this reason. Burkoff then said that, when he

submitted his application for summer employment and it was accepted by Respondent, — "you became a member of the staff and you have to back me up. Administrators have to stick together."[24] Burkoff stated she was going ahead with this, to fire Peay, and would call the staff together over the public address system — "to set an example." She said she "would show those coconut heads who was boss." The Burkoffs, Causey, Peay's supervisor (Igou), and Connor convened in the hallway adjacent to the multipurpose room. The staff was already seated 15-20 feet away in the multipurpose room with the door open. Peay, having been summoned, entered and was questioned by Burkoff. Burkoff said she had a report Peay "had called her a crook," she was "not a crook," and she proceeded to read to Peay the portion from Connor's report. Connor testified: Peay "looked like she didn't know what all was happening" and, responding to Burkoff, — "if I recall correctly, Mrs. Peay said I did or something to that effect." Burkoff then told Peay she had no other recourse than to ask her to get her things and leave the premises because she would not tolerate "anyone saying this" about her.

Connor testified that, in the late evening on April 29, he had a discussion with employees Peay, Erica Pinkney, and Kathy McCullough in the employees' lounge. He was going over with them the "financial statements, public records, federal statements" of the local and parent of the Union. He had also voiced his personal opinion concerning Burkoff's "losing money" and the possibility of layoffs because of inability to pay union wages. Peay remarked, — "don't tell me about that Rose Burkoff, I have heard she is a crook."

Peay's version varied, but not materially, from that of Connor. On April 29, in the employees' lounge, Connor had been talking to Peay about the Union. He went to his desk in that area and then called Peay to the desk.

[24] Then assigned as a part-time Pinkerton guard, Connor was approached by Burkoff and Causey in April to take employment during the coming summer months as an assistant to Causey.

He showed her the Union's financial statements, arguing that the Union just wanted the financial help of the employees. Peay commented that the statements are not necessarily true. Connor then indicated, — "well here are the statements from Multi-Medical." Peay countered, — "well, they could be crooked too." And he said, "no, the Federal Government had printed these statements and they were true."[25] McCullough and Pinkney were sitting in the lounge about 12 feet away. From the rambling manner of Connor's testimony on this issue, I have doubt that Peay used the exact language he ascribed to her. However, my finding is that she did remark to the effect that she had "heard" Rose Burkoff is a "crook" or "crooked" in the context of the discussion concerning the financial statements.

Continuing, Peay testified that on April 30, about 4:30 p.m., she was summoned and appeared in the sitting area across from the multipurpose room. Present were Mr. and Mrs. Burkoff, Connor and Causey. She observed that some employees were in the multipurpose room. Rose Burkoff confronted her — "I understand you made a statement that I know all about Rose Burkoff and she is a crook." Peay replied that she did not recall making such a statement. Burkoff then said there was no need for her to "plead temporary insanity," and ordered her to punch out the timeclock.[26]

[25] I do not find that Peay adverted to the Company's own financial statements. As I construe the testimony, she was inarticulately referring first to the union statements made available by Multi-Medical and then to the "Federal Government" reporting and disclosure forms filed by the Union.

[26] At the conclusion of Peay's direct examination, General Counsel furnished Respondent, on request, Peay's pretrial affidavit of eight pages. There was virtually no cross-examination of Peay. In addition, it is noted that Mr. Burkoff and Supervisor Igou did not testify; nor did Respondent call employees Pinkney or McCullough. (Indeed, Pinkney refused to honor General Counsel's subpoena.) Burkoff and Causey testified that, before calling Peay, they questioned Pinkney, and that, at the discharge interview, when Peay said she did not remember making the remark read to her from Connor's

Conclusions

My decision on the question of Peay's discharge is based, *inter alia,* upon the following considerations in summary: (1) Peay's unguarded leadership activities on behalf of the Union. (2) Burkoff's hostile reaction upon finding Peay attended the Board representation hearing on April 21, and her expressed belief that Peay was a paid union organizer. (3) Burkoff's use of Connor as an espionage agent, and his invasion and violation of Peay's confidence in obtaining and reporting to Burkoff on Peay's union conduct, including the remark in question critical of Burkoff. (4) The fact that on April 29 Connor was engaged with Peay in a two-party conversation, purportedly overheard from a distance by two employees who were not called to testify. (5) Connor's written report to Burkoff on April 29, pointing to Peay as a "rabble-rouser" and as a dedicated proponent of the Union, — while quoting Peay as stating she had heard Burkoff is a crook. (6) The essential nature of Peay's remark regarding Burkoff. It was made in limited reference to the reliability of the Union's financial statements given to Connor by Burkoff for campaign propaganda. It appears as an offhand comment by an obviously unsophisticated domestic-type worker. It was not articulated for general circulation and, in my opinion, was not uttered with intended or understood malice against Burkoff personally. (7) Burkoff decided summarily to discharge Peay before confronting her, — Connor's protests notwithstanding that he did not intend such a result and that it was wrong. And Connor was told he had to back her up; "administrators have to stick together."

Such a remark as attributed to Peay is certainly not to be condoned. Nevertheless, I do not accept as earnest Burkoff's protestations of alarm concerning the damage

report, Connor and Pinkney, in contradiction, asserted they heard her make the remark. Connor did not so testify and was not cross-examined on the point. Employee Denise Erwin, who overheard the conversation from the multi-purpose room, did not so testify.

to her reputation. It was Burkoff herself who took pains broadly to publicize Peay's derogatory comment. Nor do I find substance in Respondent's arguments that failure to discipline Peay would have adverse effects upon the patients and the operation of the "fledgling" facility. In the experience of industrial conflict, it is well known that employees among themselves make strong remarks concerning an employer in the heat of a union campaign. At the time she made the remark, Peay was involved with Connor, at his initiative while other employees were present, in a discussion concerning the Union's drive. She was therefore engaged in a protected activity, as I find. The further question, however, is whether her offense, in the remark affecting Burkoff, was of such gravity as to forfeit the Act's protection.[27] In all the circumstances present, I hold that it was not. Burkoff's desire to get rid of Peay because of her organizational activities is inferrably quite plain. With conspicuous alacrity, she seized upon this incident as a pretext to accomplish such purpose. It is my finding that, in discharging Peay, Burkoff was motivated in virtual entirety by her determination to remove Peay as an outstanding employee activist and paid worker for the Union, and to "set an example" in this respect of discouraging employees from their support of the Union in the impending election. Accordingly, the violation of Section 8(a)(3) is sustained.

It is also alleged in the complaint that Respondent violated 8(a)(1) "in assembling and requiring employees to witness the discharge of a known Union adherent." Connor testified that, in her office on April 30 before confronting Peay, Burkoff indicated she would call the staff together "to set an example." Some employees were present in the multipurpose room and heard the discharge interview take place outside their door.

[27] Cf. *Keystone Ship Engineering Company,* 113 NLRB 596, cited by Respondent, — where the Board held the misconduct of an employee was serious enough to foreclose any speculation that it was used as a pretext to discharge him because of his union activities.

Thereafter, Burkoff spoke briefly to the assembled employees in the multipurpose room. Employee Erwin testified Burkoff told them she had just fired Peay and wanted them to be "a witness or something."[28] In discharging Peay and thereby discouraging union membership, Section 8(a)(1) was derivatively violated. Nothing was said by Burkoff at the discharge interview or directly to the employees in the multipurpose room which can be regarded as independently coercive apart from the discharge itself. I have not been cited, nor am I aware, of any case in which Section 8(a)(1) is held to be violated by an employer calling or having employees witness a discharge which is found to be discriminatory. While it may give emphasis to an unlawful act of discharge, I hold that it creates no additional violation. This allegation is therefore dismissed.

D. *Discharge of Vera Owens*

Owens was employed since October 15, 1974, as a housekeeper assigned to the second floor of the west wing, encompassing about 15 bedrooms, as well as bathrooms, halls, lobby, solarium and elevator, as her specific responsibility. She performed a wide variety of cleaning and miscellaneous duties under the standing instructions she had since she began employment. One of her major and most time consuming jobs was to scrub the floors in the entire wing every day. All six housekeepers in the department worked on 8-4:30 p.m. shift. Her supervisor, Yorkevitch, was terminated about 1 month before she, Owens, was discharged on July 12. During this period, Mildred Shiflett was his assistant but did not directly exercise any authority over Owens. Shiflett became the housekeeping supervisor upon Yorkevitch's departure, as appears, about early June.[29]

Owens was particularly active for the Union. In October 1974 and January 1975, she accepted authoriza-

[28] As the evidence actually indicates, the employees were not assembled in order to witness the discharge in their physical presence.

[29] Unrefuted testimony of Owens.

tion cards from union agents being distributed at Respondent's driveway entrance, and she mailed her signed cards to the Union. She also signed cards during the Union's meetings within the premises on February 28 and March 18, *supra*. Shortly following this meeting in February, near the entrance to the facility as she was reporting to work, Union Agent Simon openly handed her about 15 blank cards. As she testified, this was observed by the security guard standing within a glass door 20-25 feet away.[30] During the course of the same day, she distributed 8 or 9 of these cards to unit employees in the employees' lounge. She informed employees on each of 3 occasions union meetings were to be held, and in various conversations with employees she urged them to support the Union. For several days prior to the election, she wore a union button (1 inch in diameter) on the lower right side of her uniform.

On Saturday, July 12, Owens received a telephone call at home from Supervisor Shiflett. Owens testified: Shiflett told her — "your work doesn't meet my approval and Miss Burkoff, and she said to let you go." Owens said she done her work and repeatedly requested the reason for dismissal, but Shiflett would not give her any specific reason. Shiflett also said, "You're a troublemaker and I'm going to get rid of you." At the end of the conversation, Owens remarked, "Well, you won't hear the last of this." On Monday, Owens called to speak to Burkoff at the nursing home and was told Burkoff was not in. As to the telephone call on July 12, Shiflett testified: She told Owens she was terminated — "because she didn't do the work I asked her to do." She said nothing else to Owens at that time. In later testimony, Shiflett added that they talked about what Owens had been told to do, cleaning up food stains and mopping the floors. Owens protested she had mopped the floors, "but she hadn't."

[30] The guard was other than Connor, who came on duty for the afternoon shift. It is not alleged, and I do not find, that the unnamed guard was an agent of Respondent or that he actually reported such information to Respondent.

Shiflett testified that, on July 10, she had assigned Owens certain work to be performed, described below. On July 11, Shiflett's day off, she was not present to observe Owens' work. On July 12, Owens' day off, when Shiflett returned and found the specified assignments to Owens had not been done, she decided to terminate her. Then she called Owens at home. She alone made the determination to discharge Owens.

Only these two witnesses, in direct conflict, testified on the issue. In substantial respects, I find Shiflett's testimony changing, inconsistent, implausible, and fabricated. Owens is credited.

Incidents on July 10

Shiflett testified that, early in the morning on July 10, she asked Owens to clean the elevator. Owens said she was not going to clean the "damned thing." She later observed it had been cleaned but did not know (or try to find out) if it had been done by Owens. On cross-examination, Shiflett indicated she did "not really" consider the elevator incident in her decision to dismiss Owens. Owens testified she had only her standing instructions, and was not given by Shiflett this or any other specific duty to perform on July 10. Owens indicated such an incident did occur at least 1 month before her discharge; that she did clean the elevator at that time; and that she did not then, or ever, tell Shiflett she would not perform any assigned task.

Shiflett stated that, about lunchtime, she approached Owens to clean some water from the floor of Room 202. Owens said, — "why didn't you clean it up, you was upstairs?" When Owens later said she could not find the water, Shiflett showed her where it was and it was then cleaned. In her later testimony, Shiflett admitted that she did not rely on this incident in discharging Owens.[31] This testimony was specifically denied by

[31] Respondent elicited numerous alleged faults in the work performance of Owens on which it expressly relied in the decision to discharge Owens. At the hearing, Respondent's counsel was repeatedly cautioned not to adduce incidents which were not relied upon and therefore irrelevant. In its brief, Respondent persists in its reliance on the elevator and water incidents, as well as the numerous generalized criticisms of Owens' preceding July 10, discussed *infra*.

Owens. She testified such an incident occurred 3 or 4 weeks before July 10. Shiflett had instructed her to clean a water spill in Room 202. It was just a little spot and she wiped it up with a paper towel.

Shiflett related that she instructed Owens to clean the entire floor in the wing, including some of the rooms.[32] Specifically, Shiflett told Owens about food which a patient had spilled on the floor near her bed. Also there was a "wax buildup" in the same room and around the doors and beds of each room. The only way to clean up the wax was to "strip it," — a task she had never previously asked Owens to do. When Shiflett returned on July 12, the food and wax were still there. She took a buffer and cleaned the wax up herself. Later she testified that, after Owens' termination, she sent four girls to scrape the food off the floor and remove the wax.[33] As already noted, Owens denied any such instructions on July 10. Josephine Medley is Shiflett's assistant, and was the supervisor in charge of housekeeping when Shiflett was absent. On July 11, Shiflett's day off, Medley had occasion to observe Owens and saw nothing wrong in the performance of her work. Regarding Owens' duties, Shiflett did not discuss with Medley before or after July 11 concerning the food spill, wax buildup, or any special assignments given to Owens. And Medley had never complained to Shiflett about Owens' work. Owens testified she had never been criticized or warned concerning her work performance.

Incidents before July 10

Shiflett testified she spoke to Owens several times, 3 or 4 weeks before July 12, that her work was slow, she was not mopping the floors, or cleaning the bathrooms,

[32] Undisputedly, it was Owens' normal daily duty to clean the floors.

[33] None of these employees was called to testify. It also appears that another housekeeper was normally assigned to Owens' area of work on her day off, e.g., July 12.

and "just wasn't cleaning." About 2 months before July 12, several times she told Owens the work has got to be done. "Sometimes she did the work, sometimes she didn't."[34] She spoke to Owens a "couple of times" about going to sleep at the monthly "in service" meetings, — in which the housekeepers were instructed how to mix the chemicals for cleaning purposes. Owens sat asleep through most of these. In April and May, after each such meeting, she told Owens to pay attention because it was important.[35] On cross-examination, Shiflett testified she "didn't think too much" about the sleeping incidents as basis for discharge. She had discharged Owens because she could not follow orders, specifically the food spill, the wax buildup, and "keeping the floor clean." Owens testified that she had dozed once, and that Shiflett never mentioned anything to her about sleeping during the "in service" meetings.[36]

Conclusions

Shiflett was intent to establish, as she initially testified, (a) that she independently made the decision to discharge Owens, and (b) that she had utterly no knowledge of the union activities of Owens, or of any of the housekeepers. On both points, I find the record supports the contrary. It was extricated from Shiflett that, during the week before Owens' discharge, she discussed with Rose Burkoff the failure of Owens to follow her instructions. As to these additional incidents. Shiflett said "it was the same thing," — mopping floors and cleaning bathrooms, elevators and beds. Nevertheless, Shiflett testified that, while she came to Burkoff with complaints about Owens, she indicated she did not want to get rid of Owens. However, Burkoff said, "if she's not doing her work, you've got to have somebody that will do it . . . so do what you have to do, replace

[34] These purported incidents took place before Shiflett became the housekeeping supervisor, *supra*.

[35] *Ibid.*

[36] During the course of her testimony, Shiflett volunteered that, when she first went to work, Owens was a good worker.

her."[37] Shiflett testified that it was not customary for her to consult higher management before she makes a decision to discharge; however, she has in fact done so with everyone she terminated; but in this instance, on July 12, she did not.

Considering Shiflett's reluctance to admit that Burkoff played any part in the decision, I regard this latter testimony as carrying significant implications. In view of the background of this record, it is highly probable that Burkoff was more emphatic in her instruction to Shiflett, and that the determination to discharge Owens was virtually settled during such discussion. I find that Burkoff and Shiflett then knew or believed Owens was strongly supporting the Union. When the union agents visited the premises on February 28, Shiflett was in and out of the lounge while employees were being solicited to sign cards; and she graphically demonstrated to the employees her concern and animus in opposition to the card signing. Shiflett concededly was aware that in general conversations she had with the housekeepers, and at the May 5 preelection meeting with Burkoff, Owens had asked pointed questions regarding the Union. Connor had been unlawfully engaged in ascertaining the identity of employees favoring the Union, and he did orally report back to Burkoff certain names, unspecified. Burkoff testified that, at the preelection meeting, Owens "started to say something about the way she was planning to vote and I stopped her and I said I was not interested." Although this testimony is partially self-serving, it is indicative to an extent that Burkoff would likely infer Owens' union activism. Additionally, in their telephone conversation on July 12, Shiflett told Owens she is a "troublemaker" and is going to "get rid of her.[38]

Respondent's persistent reliance upon every conceivable deficiency it could dredge up concerning Owens'

[37] Burkoff was not called on this issue.

[38] Not specifically denied by Shiflett.

work performance, many if not all of which were old, plainly concocted, or admittedly not considered by Shiflett, — signifies its pretextuous purpose in attempting to justify Owens' discharge. Shiflett had been effectively instructed by Burkoff to replace Owens. It is found that Shiflett's complaints regarding Owens' refusal and failure to perform assigned work on July 10 and 11 were contrived. The issue of union representation was then apparently still pending, after the inconclusive election. It is found that the true reason for the summary termination delivered by telephone on July 12 was Respondent's desire to "get rid of" Owens as a staunch union proponent and to discourage adherence to the Union by other employees.

Bearing in mind Respondent's violations of Section 8(a)(1) and (3) earlier described,[39] I find and conclude that it was discriminatorily motivated in discharging Owens, thereby further violating Section 8(a)(3).

F. *Remedial Bargaining Order*

1. Authorization card majority

On April 21, the parties entered into a stipulation of the record in the representation case in which it was agreed, *inter alia,* that as of such date the Union orally requested recognition and Respondent orally refused such request.[40] The stipulation incorporates an eligibility list, for purposes of the election held on May 14, with the names of 39 unit employees[41] employed during the biweekly payroll period ending April 19. The list represents the pertinent unit complement to determine the question of the Union's card majority. Signed

[39] See, e.g., *Ohmite Manufacturing Company,* 220 NLRB No. 177, at p. 9 of slip op.

[40] The pending petition filed on April 7 also constituted a continuing recognition claim. It is unnecessary to determine whether there existed a continuing claim by virtue of the petition previously filed and later withdrawn, and the direct dealings between the parties.

[41] By agreement at the hearing, the name of Clair DeShield was added to the list.

authorization cards of 21 employees were admitted in evidence. Included is the card of Linda Shiflett, who was subpoenaed by General Counsel and declined to appear. I have compared her signature on the card signed on April 23 and on her W-4 form and find they are clearly identical. The card of Sarah T. Wheeler, signed on April 2, and her W-4 form were offered and placed in the rejected exhibit file subject to restudy. General Counsel represented that, to verify Wheeler's signature, reliance had been placed on the anticipated testimony of Union Agent Green based on pretrial investigation. Green was hospitalized and unavailable to testify until October 21. Green testified she gave the card to Wheeler and received the signed card in the mail; she did not see Wheeler sign. The parties were subject to a ruling that only evidence relating to Green's testimony would be adduced on October 21. General Counsel represents that therefore no attempt was made to subpoena Wheeler. I have reexamined these particular circumstances and admit into evidence Wheeler's authorization card and W-4 form. In doing so, I have also considered Respondent's basis for objections to certain of the cards — which I find, *infra,* devoid of merit. The signatures on the card and W-4 form are unmistakably the same. With Wheeler's card included, there are 22 signed authorization cards submitted by the Union.

Two of the authorization cards, by Linda Shiflett and Louis H. Costin, are dated April 23; the remainder were signed on dates from October 31, 1974, to and including April 8. Accordingly, I find that, as of April 19, the Union had 20 valid authorization cards of 39 employees in the unit, constituting a majority. Adding the cards of Shiflett and Coston, the Union's card majority as of April 23 consisted of 22 employees of the 39 in the unit.

Respondent objects to the card of Nellie Clark on the ground of her testimony that Vera Owens, who solicited her signature, told her it was "to try to get an election." This contention is rejected; no representation was made that the cards were sought solely for the purpose of

getting an election.[42] Respondent asserts that the cards of Shirley Fleming and Ruth Ford, both dated October 31, 1974, and that of Theresa Cross, dated November 24, 1974, are invalid because they were not signed as part of the "current campaign." It argues that the Union began its campaign anew on February 28, and therefore the earlier signed cards are stale. As plainly apparent in this record, the Union was conducting a single continuous campaign commencing prior to October 31, 1974. As of February 26, when the Union and Respondent representatives met for the purpose of a card count, it is Respondent's own position that the Union was short of a majority by one card,[43] and that the Union was invited to seek additional cards. It is also evident that the Union, on and after February 28, obtained from employees duplicate cards, and the more recent of these cards were introduced. I find the cards of Fleming, Ford and Cross are sufficiently current within the campaign and may properly be counted toward the majority.[44]

2. *Gissel* and *Trading Port*

As found, Respondent violated Section 8(a)(1) by delegating a security guard to spy and report on the employees' union activities, by engaging in coercive interrogation of employees, and by repeatedly threatening the employees with layoff if they selected the Union. And it violated Section 8(a)(3) by discharging Peay and Owens because of their union activities. Peay's discharge and the various independent acts of coercion upon the employees had a clear tendency to, and did, undermine the Union's majority strength and interfered with the election held on May 14. Respondent's unfair labor practices are sufficiently egregious

[42] *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 584; *Cumberland Shoe Corporation*, 144 NLRB 1268; *Levi Strauss & Co.*, 172 NLRB 732.

[43] The tests each party applied at such meeting for counting the cards do not appear.

[44] E.g., *Blade-Tribune Publishing Company*, 161 NLRB 1512, 1513.

within the Supreme Court's standards in the *Gissel* case[45] to conclude that the application of the Board's traditional remedies will not serve to eliminate the lingering coercive effects of these practices; that a fair rerun or new election has been rendered highly improbable; that the signed authorization cards of a majority of the employees reliably demonstrate their representation desires for purposes of the Act; and that a remedial bargaining order is warranted.[46] The complaint herein does not allege a violation of Section 8(a)(5) on the basis of Respondent's refusal to bargain when the Union requested recognition on April 21. It is unnecessary to reach such an issue.[47] In *Trading Port, Inc.*,[48] the Board decided that an employer's obligation under a *Gissel* bargaining order should commence as of the date of the employer's embarkation on a clear course of unlawful conduct. As I find that Respondent embarked on such a clear course when it undertook, on April 21, to assign espionage operations to the security guard, thereafter acting upon his reports, the recommended remedy will provide that Respondent's bargaining obligation be deemed to have commenced on such date, which coincides with the Union's bargaining request and card majority.[49]

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor

[45] 395 U.S. at 613-15.

[46] E.g., *Elling Halvorsen, Inc.*, 222 NLRB No. 70.

[47] *Id.* at fn. 4. Nothing in *Gissel* conditions the bargaining order remedy upon a demand for bargaining. *Ludwig Fish & Produce Co.*, 220 NLRB No. 60, slip op. at p. 3.

[48] 219 NLRB No. 76.

[49] And see *Fordham Equipment Company, Inc.*, 221 NLRB No. 75, fn. 1.

disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Particularly in view of the discriminatory discharges, a broad cease and desist order is provided.[50]

It has been found that Respondent discharged Wilma Peay and Vera Owens in violation of Section 8(a)(3) of the Act. It will therefore be recommended that Respondent offer these employees immediate and full reinstatement to their former positions, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, by payment to them of a sum equal to that which they normally would have earned, absent the discrimination, from the date of the discrimination to the date of Respondent's offer of reinstatement, less net earnings, in accordance with the formulae set forth in *F.W. Woolworth Company,* 90 NLRB 289 and *Isis Plumbing & Heating Co.,* 138 NLRB 716. It will be further recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay and the rights of reinstatement under the terms of these recommendations.

In view of the provision for a remedial bargaining order, it is recommended that the election held on May 14 be set aside and the petition be dismissed.

Upon the foregoing findings of facts, and upon the entire record in the cases, I make the following:

[50] *N.L.R.B. v. Express Publishing Company,* 312 U.S. 426; *N.L.R.B. v. Entwistle Mfg. Co.,* 120 F.2d 532 (C.A. 4).

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Wilma Peay and Vera Owens, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing, and by other specific acts and conduct interfering with, restraining and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. All regular full-time and regular part-time service and maintenance employees employed by Respondent at its Towson, Maryland, facility, excluding registered nurses, licensed practical nurses, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

6. Since April 21, 1975, the Union has been, and is now, the exclusive representative of all employees in the appropriate unit within the meaning of Section 9(a) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent's unlawful conduct interfered with the election held on May 14, 1975.

Upon the above findings of fact, conclusions of law, and the entire record in the cases, and pursuant to

Section 10(c) of the Act, I hereby recommend the following:[51]

ORDER

Respondent, Multi-Medical Convalescent and Nursing Center of Towson, Towson, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities or those of their fellow employees.

(b) Threatening employees with layoff, discharge, or other reprisal, if they select as their representative or because of their activities in behalf of, District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, or any other labor organization.

(c) Assigning or utilizing its security guards, or any other agents, to engage in surveillance of and reporting on employees' union sentiments or activities in violation of Section 8(a)(1) of the Act.

(d) Discouraging membership in the above-named labor organization, or in any other labor organization, by discharging employees, or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

(e) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

[51] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer Wilma Peay and Vera Owens immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in "The Remedy" section of the Decision of the Administrative Law Judge.

(b) Upon request, recognize and bargain collectively with District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive bargaining representative of its employees in the appropriate unit, described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(c) Preserve and make available to the Board or its agents all payroll and other records, as set forth in "The Remedy" section of the Decision of the Administrative Law Judge.

(d) Post at its Towson, Maryland, facility, copies of the notice attached hereto marked "Appendix."[52] Copies of said notice, on forms provided by the Regional Director for Region 5, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

[52] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case No. 5-RC-9304 be severed and remanded to the Regional Director for appropriate disposition in conformance with the findings herein.

Dated at Washington, D.C.

BENJAMIN B. LIPTON,
Administrative Law Judge.

NOTICE TO EMPLOYEES

Posted by Order of The National Labor Relations Board

An Agency of The United States Government

AFTER A TRIAL, IN WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE; AND WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

WE WILL NOT ask you anything about your union activities, or the union activities of your fellow employees, in a manner which would coerce you regarding your rights under the National Labor Relations Act.

WE WILL NOT threaten you with discharge, layoff, or other punishment, because of your activities or sentiments in behalf of DISTRICT 1199E, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, or any other labor organization.

WE WILL NOT assign or use our security guards, or any other agents, to spy and report to us on your union activities or sentiments.

WE WILL NOT discourage membership in, or activities in behalf of, DISTRICT 1199E, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, or in any other labor organization, by discharging employees, or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of your rights guaranteed in the National Labor Relations Act, which are as follows:

To engage in self-organization;
To form, join, or help unions;
To bargain collectively through a representative of your own choosing;
To act together for collective bargaining or other mutual aid or protection;
To refuse to do any or all of these things.

WE WILL, upon request, recognize and bargain with DISTRICT 1199E, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the appropriate unit, composed of all regular full-time and regular part-time service and maintenance employees, excluding registered nurses, licensed practical nurses, office clerical employees, professional employees, guards and supervisors as defined in the Act, regarding their rates of pay, wages, hours of employment, and other terms and conditions of employment; and, if an understanding is reached, embody such understanding in a signed agreement.

Since it has been found that we unlawfully discharged WILMA PEAY and VERA OWENS, — WE WILL offer them back their regular jobs, or if such jobs no longer exist, WE WILL give them substantially equivalent jobs; and WE WILL pay them for the earnings they lost because of the

discrimination against them, plus 6 percent interest.

All our employees are free to remain or refrain from becoming or remaining members of a labor organization.

MULTI-MEDICAL CONVALESCENT AND NURSING CENTER OF TOWSON,
(Employer).

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED
BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. 1019 Fallon Federal Building, Hopkins Plaza, Baltimore, Md. 21201 (Tel. No. 301-962-2772).

No. 76-1849

In the Supreme Court of the United States

OCTOBER TERM, 1977

MULTI-MEDICAL CONVALESCENT AND NURSING CENTER OF TOWSON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
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In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 550 F. 2d 974. The decision and order of the National Labor Relations Board (Pet. App. 8a-50a) are reported at 225 NLRB No. 56.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1977, and a petition for rehearing *en banc* was denied on March 28, 1977 (Pet. 2). The petition for a writ of certiorari was filed on June 24, 1977.[1] The

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[1]On April 21, 1977, the Chief Justice denied petitioner's motion for stay of mandate pending the disposition of the petition for certiorari.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that union agents did not misrepresent the purpose of cards signed by a majority of employees designating the union as the collective bargaining representative.

2. Whether the Board properly issued a bargaining order to remedy petitioner's unfair labor practices directed at destroying the union's majority, notwithstanding employee turnover following the commission of the unfair labor practices.

3. Whether the Administrative Law Judge's exclusion of certain evidence denied petitioner due process of law.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.

STATEMENT

The Board found that, in early 1975, in response to the Union's[2] organizational campaign, petitioner violated Section 8(a)(1) of the Act by threatening employees with layoffs if they selected the Union as their representative, by coercively interrogating employees about their union activities, and by spying on the employees' union activities (Pet. App. 8a-9a, 17a-28a, 43a). The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging union activist Wilma Peay two weeks before the Board election, and by discharging union activist Vera Owens when the Union's objections to its loss of the election were still pending (Pet. App. 8a-9a, 16a, 28a-40a). Finally, the Board found that the Union had valid authorization cards from a majority of the employees in an appropriate unit and that petitioner's unfair labor practices were so serious that a fair rerun election could not be held. Accordingly, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the majority representative, and that a bargaining order was an appropriate remedy (Pet. App. 9a-10a, 40a-43a). The court of appeals enforced the Board's decision and order in its entirety (Pet. App. 1a-7a).

ARGUMENT

1. Petitioner is incorrect in contending (Pet. 4-6) that the Board and the court below departed from *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, in counting two authorization cards clearly designating the Union as collective bargaining representative, where the signers were told by the Union agent that the

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[2]District 1119E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

cards would be used to help the Union get an election. As this Court stated in *Gissel Packing, supra,* 395 U.S. at 606-607, "There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him the card will probably be used first to get an election." *Gissel Packing* approved the Board's *Cumberland Shoe Corp.* doctrine, 144 NLRB 1268, under which authorization cards, such as those here, designating the union as bargaining representative are counted "unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election." 395 U.S. at 584, 606; emphasis supplied. Union representations that the cards would be used to obtain an election do not suffice to "deliberately and clearly" cancel the language of the cards (*id.* at 606), which authorizes the Union to act as the bargaining representative.[3]

2. There is no merit in petitioner's contention (Pet. 7-9) that the Board must be bound by employee turnover in determining the appropriateness of a bargaining order. For the Board to withhold its bargaining order remedy because of turnover occurring after the employer's unfair labor practices "would in effect be rewarding the employer and allowing him to 'profit from [his] own wrongful refusal to bargain.'" *National Labor Relations Board* v. *Gissel Packing Co., supra,* 395 U.S. at 610, quoting from *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 704. Accord: *National Labor*

[3]Contrary to petitioner's contention (Pet. 6), *National Labor Relations Board* v. *South Bay Daily Breeze,* 415 F. 2d 360 (C.A. 9), and *Fort Smith Outerwear, Inc.* v. *National Labor Relations Board,* 499 F. 2d 223 (C.A. 8), are not in conflict with the decision below. In each of those cases, the court applied the *Gissel Packing-Cumberland* rule to the facts before it.

Relations Board v. *Lou De Young's Market Basket, Inc.,* 430 F. 2d 912, 915 (C.A. 6); *National Labor Relations Board* v. *L. B. Foster Co.,* 418 F. 2d 1 (C.A. 9), certiorari denied, 397 U.S. 990.

The propriety of the Board's bargaining order here is not undermined by the cases cited by petitioner (Pet. 7-9). In *National Labor Relations Board* v. *General Stencils, Inc.,* 472 F. 2d 170, 173-175 and n. 5 (C.A. 2), and *Peerless of America, Inc.* v. *National Labor Relations Board,* 484 F. 2d 1108, 1118-1121 (C.A. 7), the courts found that the unfair labor practices were not sufficiently serious to preclude a second election; they relied on turnover merely to reinforce the conclusion not to enforce the bargaining order. *National Labor Relations Board* v. *American Cable Systems, Inc.,* 427 F. 2d 446 (C.A. 5), certiorari denied, 400 U.S. 957, was returned to the Board for reconsideration in light of the intervening decision in *Gissel;* the court simply held that, "at the time the Board reconsidered the propriety of a bargaining order on remand under *Gissel* standards, it was required to consider the then existing situation at the company to determine whether a fair election was still improbable." *J.P. Stevens & Co., Inc.* v. *National Labor Relations Board,* 441 F. 2d 514, 525, n. 16 (C.A. 5), certiorari denied, 404 U.S. U.S. 830. Finally, in *National Labor Relations Board* v. *Ship Shape Maintenance Co., Inc.,* 474 F. 2d 434 (C.A. D.C.), the court expressly recognized that normal employee turnover is not a ground for refusing to enforce an otherwise valid bargaining order, but declined to affirm the bargaining order in that particular case because of the "extraordinary rate of turnover indigenous to the Company's * * * operations" (*id.* 443), and the complete absence of "overt anti-union animus" accompanying the company's unfair labor practices (*id.* at 442).

3. Nor is there merit to petitioner's contention (Pet. 9-10) that it was denied due process by the Administrative Law Judge's refusal to permit it to adduce evidence which tended to impeach the credibility of certain witnesses and which showed turnover in the bargaining unit.[4] As shown, the evidence on turnover is legally irrelevant. Moreover, the Board and the court below concluded (Pet. App. 3a-6a, 8a-9a, n. 1), after a careful review of the record, that the exclusion of the other evidence was not prejudicial to petitioner. The Administrative Law Judge's resolution of these evidentiary questions does not present an issue warranting further review.

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[4]The witnesses to whom petitioner apparently refers were employees Connor and Owens. Before the Board, petitioner objected that it should have been allowed to show that Connor left his position with petitioner under circumstances different from those to which he testified. Relying on the principle that a trier of fact is entitled to discredit a portion of a witness' testimony without discrediting the witness generally (see *Pioneer Drilling Co.*, v. *National Labor Relations Board*, 319 F. 2d 961, 964, n. 3 (C.A. 10)), the Board correctly held that, even had the judge rejected Connor's explanation for leaving, he was nonetheless entitled to credit Connor's testimony that he was solicited by petitioner to engage in unlawful surveillance (Pet. App 9a). Petitioner also objected to the exclusion of evidence that Owens filed a charge with the Equal Employment Opportunity Commission in connection with her discharge, contending that a violation of Title VII of the Civil Rights Act of 1964 was inconsistent with a violation of the NLRA. (Exceptions to Administrative Law Judge's decision. p. 4.) However such evidence is irrelevant; the fact that a discharge was motivated by consideration which violate Title VII does not negate the possibility that it was also motivated by considerations which violate the NLRA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

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MICHAEL S. WINER,
FREDERICK HAVARD,
Attorneys,
National Labor Relations Board.

AUGUST 1977.

DOJ-1977-08

No. 76-1846

In the Supreme Court of the United States

OCTOBER TERM, 1977

ARIZONA POWER AUTHORITY, ET AL., PETITIONERS

v.

CECIL D. ANDRUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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INDEX

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-39a) is reported at 549 F. 2d 1231. The opinion of the district court (Pet. App. C, 41a-54a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1977. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 28, 1977 (Pet. App. B, 40a). The petition for a writ of certiorari was filed on June 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the allocation of electrical power generated at Colorado River Storage Project facilities among Northern

and Southern Division preference customers is committed by law to the Secretary of the Interior's discretion.

2. Whether, in any event, the Secretary abused his discretion in basing the allocation upon the particular market criteria he selected.

STATUTES INVOLVED

The relevant provisions of the Colorado River Storage Project Act, 70 Stat. 105, 107, 109, 43 U.S.C. 620c, 620f, and of the Reclamation Project Act of 1939, 53 Stat. 1187, 1194-1195, 43 U.S.C. 485h(c), are set forth at Pet. 2-3.

STATEMENT

In 1956 Congress enacted the Colorado River Storage Project (CRSP) Act, 70 Stat. 105, 43 U.S.C. 620 *et seq.*, for the purpose of facilitating development of the Upper Colorado River Basin.[1] Pursuant to this Act, the Secretary constructed several large dams with attendant facilities for generating hydroelectric power. The installed generating capacity of these facilities is 1,260,000 kilowatts (Pet. App. A, 8a).

The construction costs of these facilities is to be recaptured in large part by sales of hydroelectric power (Pet. App. A, 9a). The Bureau of Reclamation of the Department of the Interior, under the direction of the Secretary, is responsible for marketing power from all federal hydroelectric facilities on the Colorado River, including, besides CRSP, facilities in the Lower Basin constructed and operated pursuant to the Boulder Canyon Project Act of

[1]The Colorado River Compact divides the entire Colorado River Basin into an Upper Basin and a Lower Basin, with the dividing point at Lee's Ferry, Arizona (Pet. App. A, 4a). For a comprehensive discussion of the development of the Colorado River Basin, see *Arizona* v. *California*, 373 U.S. 546, 550-564.

1928, 45 Stat. 1057, 43 U.S.C. 617 *et seq.*; the Boulder Canyon Adjustment Act of 1940, 54 Stat. 774, 43 U.S.C. 618 *et seq.*; and the Parker-Davis Project Act of 1954, 68 Stat. 143 (Pet. App. C, 42a). Unless provided otherwise by statute, all such power is sold as the federal reclamation laws prescribe. These laws include Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1187, 1195, 43 U.S.C. 485h(c), which provides that municipalities, public corporations or agencies, cooperatives, and other nonprofit organizations shall be given a "preference" in sales or leases of electricity (Pet. App. A, 9a-10a; Pet. App. C, 43a). Agencies and organizations entitled to such a preference are termed preference customers (Pet. App. A, 10a).

In the 1950's, the Secretary confronted the problem of allocating the low-cost power that would soon flow from the CRSP dams then under construction. On March 9, 1962, after considering the Federal Power Commission's survey of markets and the Bureau of Reclamation's recommendations, the Secretary announced the general power Marketing Criteria (Pet. App. A, 10a-11a). The Criteria divided the Colorado basin into two marketing areas: a Northern Division consisting of Colorado, New Mexico, Wyoming and Utah, and a Southern Division consisting of Arizona and certain portions of California and Nevada (Pet. App. A, 5a n. 7).[2]

The Marketing Criteria provided for a permanent allotment of 80 percent of the summer season CRSP power and 93 percent of the winter CRSP power to Northern Division preference customers, with the remaining 20 percent of summer power and 7 percent of winter power

[2]The Northern and Southern Divisions established by the Marketing Criteria closely correspond to the Upper and Lower Colorado Basins as defined by the Colorado River Compact (Pet. App. A, 4a-5a and n. 7).

allocated to Southern Division preference customers (Pet. App. A, 11a-12a).[3] However, because power marketing surveys indicated that preference customers in the relatively undeveloped Northern Division would not be able to use all of their permanent allocation for several years, the Marketing Criteria further provided that power permanently allotted to the Northern Division, but in excess of its current demands, would be temporarily marketed in the Southern Division, subject to withdrawal upon three years' notice (*id.* at 12a).

The Secretary then sent out purchase contract application forms for CRSP power to potential preference customers. All application forms contained a clause whereby prospective customers were required to acknowledge the Marketing Criteria, including the Secretary's authority to withdraw power which had been permanently allocated to the Northern Division (Pet. App. A, 12a-13a). Twenty-seven Southern Division preference customers, including all of the petitioners except the Arizona Power Authority,[4] purchased CRSP power under contracts by which they acknowledged the Secretary's authority to withdraw certain of the power for future use in the Northern Division (*id.* at 13a).

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[3]In making this allocation, the Secretary took into account that all of the power generated at federal facilities situated in the Lower Basin is sold to Southern Division customers. When the entire Colorado Basin is taken as a unit, the Southern Division customers receive 58.3 percent of the summer power and 52.8 percent of the winter season power (Pet. App. C, 46a).

[4]The Arizona Power Authority filled out a purchase application form but struck out the provision acknowledging the Marketing Criteria; consequently, the Secretary rejected the application form and no CRSP power was sold to the Authority. The Authority did not seek judicial review of the Secretary's rejection of its application (Pet. App. A, 13a).

In December 1970, the Secretary notified Southern Division customers that he would give notice not later than March 31, 1973 that CRSP power permanently allocated to the Northern Division would be withdrawn from Southern Division customers beginning with the 1976 summer season (*ibid.*). In December 1971, the Arizona Power Authority and seven Arizona preference customers filed this action to have the Marketing Criteria declared null and void, and to enjoin the Secretary from withdrawing any CRSP power currently marketed in the Southern Division (*ibid.*). The Secretary's answer contended, among other things, that the issuance and implementation of the Marketing Criteria were within his lawful authority, and he moved for summary judgment (Pet. App. C, 50a).[5]

The district court held that the Marketing Criteria were within the Secretary's lawful authority and not arbitrary or capricious (Pet. App. C, 52a). The court of appeals affirmed on the ground that the Secretary's allocation of CRSP power among the Northern and Southern Division preference customers was not subject to judicial review, because Congress had not articulated any statutory standards against which the Secretary's allocation could be measured, *i.e.*, there was "no law to apply" (Pet. App. A, 36a-37a).

ARGUMENT

The decision of the court of appeals, on whose opinion (Pet. App. A, 1a-39a) we principally rely, is correct and presents no issue of general importance warranting review by this Court.

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[5]The Northern Division Power Association, an association representing Northern Division preference customers, was authorized to intervene as a defendant (Pet. App. A, 14a n. 28).

1. The Administrative Procedure Act, 5 U.S.C. 701(a)(2), precludes judicial review of "agency action * * * committed to agency discretion by law." Thus, although the Act generally favors judicial review of agency actions, Section 701(a)(2) provides a narrow exception "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410. The court of appeals, recognizing this presumption in favor of judicial review (Pet. App. A, 14a), considered the Colorado River Storage Project Act and its lengthy legislative history with great care, and correctly concluded that Congress has not provided any legal standards that the courts may employ in reviewing the Secretary's allocations of CRSP power among Northern and Southern Division preference customers.

There is nothing in the CRSP Act or its legislative history that provides a standard by which to judge the Secretary's action. The Secretary is authorized by the CRSP Act to enter into contracts for the sale of federal power generated at CRSP facilities, 43 U.S.C. 620c, 485h(c). Unless otherwise provided by law, federal contracting officers normally have considerable discretion to select the customers to whom federal properties are to be sold. "The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it." *Arizona* v. *California*, 373 U.S. 546, 580.

Congress placed no statutory limitations upon the Secretary's discretion to allocate CRSP power contracts among Northern and Southern Division preference customers. As the court of appeals recognized (Pet. App. A,

17a-18a), the text of the CRSP Act itself contains no provisions which arguably restrict the Secretary's discretion to allocate CRSP power contracts. Nor do petitioners themselves specify any such provisions. Petitioners do, however, argue that the legislative history of the CRSP Act, as distinct from the text of the Act itself, discloses a congressional intent to restrict the Secretary's authority to allocate CRSP power among Northern and Southern Division preference customers (Pet. 9-15). The court of appeals, as its opinion demonstrates, carefully examined the legislative history (including each of the references cited by petitioners); and it correctly rejected petitioners' argument.

The Colorado River Storage Project was, in its original proposed form, a controversial plan which received considerable attention in Congress. The original CRSP bills contained, *inter alia*, a power marketing provision requiring that all contracts with customers outside the Upper Basin must provide for termination or modification to the extent necessary to meet the demand for power from Upper Basin States (Pet. App. A, 20a). These provisions were attacked for giving nonpreference private customers in the Upper Basin priority over preference customers in the Lower Basin (Pet. App. A, 19a-20a). In addition, some critics contended that the project would fail to generate sufficient revenue if the Secretary were restricted to selling the CRSP power in the then undeveloped Upper Basin (Pet. App. A, 20a-21a).

To meet these criticisms, Congress amended the bills to permit the Secretary to maximize revenues by selling power to Lower Basin customers while at the same time retaining the usual reclamation law preferences for public bodies and nonprofit organizations. However, as the court of appeals observed, no one at the congressional hearings objected to

the original power marketing restrictions on the ground that the Lower Basin States would be deprived of their fair share of CRSP power (Pet. App. A, 24). Accordingly, when the House Committee remarked that the bill had been amended so that the States would be "on the same basis," it meant only that the original requirement permitting nonterminable power allocations only to Upper Basin customers had been deleted, and a new provision added which would permit the Secretary to market the CRSP power wherever he deemed best in order to maximize power revenues in a manner consistent with the usual reclamation law preferences (Pet. App. A, 24a-25a, 35a).

The entire legislative history, when read in context, shows that Congress did not intend to establish any particular standard for the allocation of CRSP power between Upper and Lower Basin customers.[6] The isolated bits of legislative history upon which petitioners rely, taken in context, support the view that Congress intended to grant the Secretary a great degree of flexibility in the allocation of CRSP power among preference customers. This is, as the court of appeals correctly concluded, a case in which Congress chose not to provide a "controlling standard for CRSP power distribution" and instead committed

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[6]Petitioners here, as in the court below (Pet. App. A, 36a-37a), have failed to articulate any specific standard by which Congress intended to govern allocations of CRSP power among Upper and Lower Basin preference customers. As the court of appeals correctly observed, petitioners' suggestion (Pet. 10-11) that the standard for allocation is the "same basis" is no standard at all, since the "same basis" could be interpreted to require allocation on the basis of each state's population, its number of preference customers, its past or projected energy needs, or its percentage allocation of water under the Colorado River or the Upper Colorado River Basin Compacts (App. A, 36a-37a). It could even mean that each of the seven states would receive one-seventh of the power.

"the decision—with certain express limitations not applicable here—to the discretion of the Secretary" (Pet. App. A, 37a).

2. Moreover, even if the Secretary's allocation were subject to judicial review, the district court properly concluded that the criteria issued by the Secretary are "within his statutory authority * * * reasonable, and not arbitrary or in abuse of his discretion" (Pet. App. C, 50a). As our discussion in Point I demonstrates, Congress intended to allow the Secretary broad discretion in allocating CRSP power so as to maximize revenues while respecting the reclamation law preferences.

Although Congress chose not to place specific limitations on the Secretary's discretion, the court of appeals properly concluded that the legislative history of the CRSP Act "evidenced an intent to promote primarily the development of the upper division states" (Pet. App. A, 35a). It noted that the "message of [the] debates is clear: both legislative bodies intended the upper (northern) division states to be eventually the primary beneficiaries of the legislation. * * * Congress intended some type of geographic preferences in favor of the states of the upper division" (Pet. App. A, 35a).

Against this background, the allocation of 80 percent of summer power and 97 percent of the winter CRSP power to the Upper Division states was a proper exercise of the Secretary's discretion. Taking into account this allocation of CRSP power, the Lower Basin states will be receiving 58.3 percent of the total power from all the Colorado River Basin power plants, and 52.8 percent of the winter power (Pet. App. C, 46a). Moreover, as the district court concluded, these criteria constitute a long-standing administrative interpretation that is entitled to great deference (Pet. App. B, 52a). They were adopted

in 1962 on the basis of a series of "extensive studies and reports" in which most preference customers from both the Upper and Lower Basins participated (Pet. App. B, 51a).

As the district court stated (Pet. App. C, 52a):

> Since the criteria, approved by two Secretaries of Interior, were based on careful, prolonged studies by experts in the field pursuant to known and fixed guidelines and in accord with statutory authority, the criteria as decided upon by the Secretary and here under attack cannot be said to be arbitrary, capricious, or unreasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
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MYLES E. FLINT,
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Attorneys.

SEPTEMBER 1977.